

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

PHILLIP GAY, #109431
Petitioner,

vs.

RALPH HOOKS, Warden, et al:
Respondent(s).

)
)
) CASE NO.: 2008-71071-CV-2864-AWH-44
)

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MIDDLE DISTRICT ALA

PETITIONER'S OBJECTION(S) TO
MAGISTRATE JUDGE'S RECOMMENDATION

Comes now the Petitioner, Phillip Gay, pro se and enters his Objection(s) to the Magistrate-Judge's Recommendation(s), dated July 16, 2008, in the above-styled cause; and in support thereof states the following:

1. The petitioner claim(s) persented in the 28 USC §2254 habeas corpus petition, alleging "that, He has been improperly and arbitrarily denied relief from the Life without Parole sentence under §13A-5-9.1 of Ala.Crim.Code(Acts 2001)", clearly presents a claim based upon the Fourteenth Amendment's Due Process and Equal Protection of Law. (Magistrate-Judge's Report, pp. 2-6; hereafter referred to as "MJR"). The State Court Judge's interpretation of §13A-5-9.1, in denying the petitioner's motion for reconsideration of sentence, is arbitrary to clearly established State law, as decided in Kirby v. State, 899 S o.2d 968(Ala.2004). In, Holt v. State, CR-04-1250, (Ala.Crim.App., December 23, 2005), 2005 WL 3507967, the Alabama Court of Criminal Appeals held: " The fact that a crime is defined as a 'violent offense' under §13A-11-70 and/or §12-25-32,....., is not binding on a Circuit Court in determining whether an inmate is a 'non-violent convicted offender' within the language of §13A-5-9.1". Id.

The Court of Criminal Appeals further held" The fact that the inmate's underlying conviction was for an offense statutorily defined as a 'violent offense', does not preclude a Circuit Court from considering other factors presented to it, such as the facts and circumstances surrounding the underlying offense, the facts and circumstances surrounding the inmate's prior convictions, the inmate's prison record, and any 'other factors brought before the judge in the record of the case'." Id.

Note:

In the instant case, the "reviewing-judge" failed to require the District Attorney to respond to the proper motion for reconsideration of sentence and further failed to conduct and evidentiary hearing to determine the fact(s) surrounding the petitioner's case. Contra., Holt v. State, supra.

The petitioner's rights of Due Process was clearly violated by the "reviewing-judge's" summary dismissal of the proper §13A-5-9.1 motion. Accord, U.S. ex.rel.-Arnold v. Illinois Prisoner Review Board(N.D.Ill.1992) 803 F.Supp.222,224-226.

(cont.)

2. The Magistrate-Judge, in his conclusion "that, the petitioner has not adequately presented an Equal Protection claim", has failed to require the Respondent(s) to respond to the ¶2254 habeas corpus petition. (MJR, pp.4-6). Had the Magistrate-Judge required the respondent(s) to respond to the petitioner's claim(s) for relief, the petitioner possessed sufficient evidence "in the form of record(s)" to support his Equal Protection Claim; where the State of Alabama has afforded relief to other inmate(s) under the exact same set of facts as which the reviewing-judge denied the petitioner's ¶13A-5-9.1 motion. (See: Petitioner's Exhibit A, attached).

As a matter of record, the State of Alabama does not "uniformly" deny the reduction of sentence(s) of Life without Parole and Release on Parole, to all prisoners convicted for violent-offenses and cannot justify the denial of the petitioner's ¶13A-5-9.1 motion for reconsideration of sentence. Accord, Moseley v. Klincar, 711 F.Supp.463,465(N.D.Ill.1989).

The petitioner sets forth specific facts to support his claim of violation of Equal Protection of Law. Moseley, supra.

WHEREFORE, premises considered, Petitioner moves the District Court to: 1) OVER-RULE the Magistrate-Judge's Report and Recommendation for dismissal, 2) Issue Order "that further proceedings be conducted on the ¶2254 petition as required by law, and 3) Proceed to appoint counsel to represent the petitioner on the ¶2254 petition.

Submitted by:

Note:

Prepared with the assistance of layperson.



PHILLIP GAY
Petitioner Pro Se
AIS NO.: 109431
St. Clair Correctional Facility
1000 St. Clair Road
Springville, AL 35146-5582

Certificate of Service

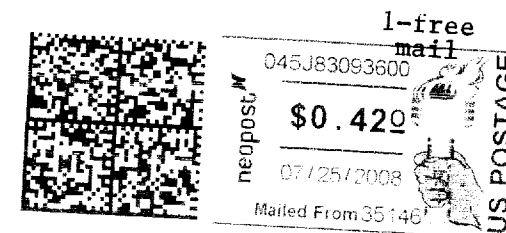
I hereby certify that a copy of the foregoing has been served upon the Respondent(s), on this the 23rd day of July, 2008; by depositing in the United States Mail, postage prepaid, correctly addressed, to:

Troy King, Attorney General
Office of Attorney General
State of Alabama
Criminal Appeals Division
11 South Union Street
Montgomery, AL 36130-0152



PHILLIP GAY
Petitioner Pro Se

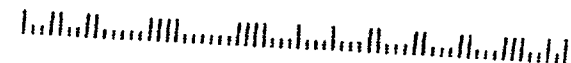
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Inmates That Have Received Sentence Reductions Under 13A-5-9.1
ExParte Kirby.

| <u>Name</u> | <u>Conviction</u> | <u>County</u> | <u>Case No.</u> |
|-------------------------|-------------------------------------|----------------------|------------------------|
| 1. Terry McLester | 1 st Robbery | Houston | CC 81-881.61 |
| 2. Ronnie Wabbington | 1 st Robbery | Jefferson | |
| 3. Johnny Holley, Jr. | 1 st Robbery | Tuscaloosa | CC 80-102.69 |
| 4. John Bratton | 1 st Robbery | Tuscaloosa | CC 95-670 |
| 5. William Holt | 1 st Robbery | Jackson | CC 87-443 |
| 6. James Hopson | 1 st Robbery | Jefferson | CC 92-4936 |
| 7. Billy Helms | 1 st Robbery | Houston | |
| 8. Dwain Daniel | 1 st Robbery | Jefferson | CC 94-3408 |
| 9. Alvin Daniels | 1 st Robbery | Jefferson | CC 91-1817 |
| 10. Samuel Thompson | 1 st Robbery | Jefferson | CC 84-1480 |
| 11. Larry Gardner | 1 st Robbery | Autauga | CC 82-132 |
| 12. William Gates | 1 st Robbery | Montgomery | |
| 13. Willie Brewer | 1 st Robbery | Houston | CC 86-696 |
| 14. Darren Caudle | 1 st Robbery | Madison | CC 92-572 |
| 15. William Sanders | 1 st Robbery | Jefferson | |
| 16. Jeff Bell/Fawaad | 1 st Robbery | Jefferson | |
| 17. Jimmy Childers | 1 st Burglary | Jefferson | CC 96-5183 |
| 18. Jerald Sanders | 1 st Burglary | Mobile | CC 94-3224 |
| 19. Junior Kirby | 1 st Trafficking | Jackson | CC 89-252 |
| 20. Rex Norris | 1 st Trafficking | Jefferson | CC 93-786 |
| 21. Napoleon Mason | 1 st Trafficking | Jefferson | |
| 22. Donnie Phillips | 1 st Trafficking | Jefferson | CC 99-625.61 |
| 23. Daryl Lewis | 1 st Trafficking | Tuscaloosa | CC 99-62 |
| 24. Theon Williams | 1 st Trafficking | Jefferson | |
| 25. Darrell Wilson | 1 st Trafficking | Jefferson | |
| 26. William Bonner | 1 st Trafficking | Tuscaloosa | CC 91-2048 |
| 27. Michael Peek | 1 st Trafficking | Macon | CC 98-100 |
| 28. Raymond Smith | 1 st Robbery | Houston | CC 91-314 |
| 29. Mabra Wright, Jr. | 1 st Burglary/Sex. Abuse | Covington | CC 97-169 |
| 30. Vernon McElroy | 1 st Trafficking | Etowah | CC 91-281 |
| 31. LaTerrance Williams | 1 st Trafficking | Tuscaloosa | |
| 32. Douglas Gray | 1 st Trafficking | Morgan | |
| 33. Richard Wiley | 1 st Escape | Elmore | CC 95-278 |
| 34. Louis Johnson | 1 st Robbery | Jefferson | CC81-682 |
| 35. Ontourus Porter | 1 st Trafficking | Jefferson | CC98-4275 |
| 36. Willie Walker | 1 st Robbery | Jefferson | CC86-1191 |
| 37. Harlin P. Seritt | 1 st Robbery | Jefferson | CC80-1497 |
| 38. Willie Toyer | 1 st Trafficking | Jefferson | CC97-5492 |

| | | | |
|------------------------|--|------------|------------|
| 39. Stephen Shamburger | 1 st Robbery | Jefferson | |
| 40. Larry Hardy | 1 st Robbery | Jefferson | |
| 41. Anthony Sledge | 1 st Robbery | Madison | CC93-0875 |
| 42. David Naismith | 1 st Robbery | Houston | |
| 43. Edward Earl Watts | 1 st Burglary | Mobile | CC85-2312 |
| 44. Edward Penn | 1 st Robbery | Jefferson | CC85-667 |
| 45. James Henry | 1 st Robbery | Jefferson | CC92-4233 |
| 46. William Brown | 1 st Robbery | | |
| 47. Rayford Rancher | 1 st Robbery | Jefferson | |
| 48. Dedrick Wright | 1 st Trafficking | Jefferson | |
| 49. James R. Edwards | Murder | Houston | CC82-85 |
| 50. Charles Woodson | Attempted Murder | Crenshaw | CC99-36&37 |
| 51. Ronald Box | 1 st Trafficking | Jefferson | |
| 52. Gates Pritchett | 1 st Robbery | Jefferson | CC86-2463 |
| 53. Zonnie Weaver | 1 st Burglary | Mobile | |
| 54. Derek Jenkins | 1 st Robbery | Montgomery | |
| 55. John Paul Rice | 1 st Robbery | Baldwin | |
| 56. Charles McComb | 1 st Trafficking | Jefferson | |
| 57. John Allen Bratton | 1 st Robbery | Jefferson | CC95-670 |
| 58. Jerry Corbin | 1 st Robbery | Jefferson | |
| 59. Earnest Doster | 1 st Robbery | Houston | CC94-140 |
| 60. Paul Staubs | 1 st Robbery | Houston | |
| 61. Bill Mardis | 1 st Robbery | Montgomery | |
| 62. Jimmy Burroughs | 1 st Robbery | Marshall | CC89-048 |
| 63. Lacey Butler | 1 st Rape & 1 st Robbery | Autauga | CC84-160 |
| 64. Anthony Heulett | 1 st Rape & 1 st Sodomy | Madison | CC92-397 |
| 65. Kenneth Hayes | 1 st Trafficking | Hamilton | CC97-122 |
